UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER04-1160-000 ER04-1160-001

(February 22, 2005)

Commissioner Kelly's dissenting statement to the order issued February 16, 2005 in the above-referenced proceeding is attached.

Linda Mitry,
Deputy Secretary.

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KELLY, Commissioner, *dissenting*:

I believe that appropriate liability limitation provisions can strike a proper balance between reasonable customer rates and the rights of harmed parties to seek recovery for certain acts by jurisdictional utilities. Based on the record in this proceeding, however, I do not think that this order achieves such a balance.

Applicants' proposed tariff language in sections 10.3(a) and 10.3(b) of Midwest ISO's open access transmission tariff (OATT) provides the Transmission Owner/Provider:

> shall not be liable, whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any Transmission Customer, User, or any third party or other person for any damages whatsoever . . . arising or resulting from *any* act or omission *in any way associated with service* provided under this Tariff, *including, but not limited to*, any act or omission that results in an interruption, deficiency or imperfection of service, except to the extent that the Transmission Owner [Provider] is found liable for gross negligence or intentional misconduct . . . . " [Emphasis added].

This order discusses the applicability of these limited liability provisions only within the context of claims that result from service interruptions, and seems to cover both claims that result from economic damages and claims that result from personal injury or death. I believe that there may be good reason to limit liability for economic damages that result from service provided under the tariff. It may be difficult, for example, for a utility to reduce the type of exposure for economic losses that may result from service interruption. Each transmission customer may experience losses that are unique to their particular circumstance. In contrast, however, I do not believe that a utility should be insulated from claims of recovery for personal injury or death directly caused by the act of the covered utility. The existing negligence standard gives utilities the appropriate incentive to avoid negligent conduct and adhere to an appropriate standard of care. The proposed limitation on liability, which allows recovery only in cases of gross

negligence or intentional misconduct, dilutes this incentive, and does not encourage the utility to protect against dangers such as negligently maintained transmission lines or irregular voltage surges. Thus, unlike the majority, I am not convinced of the wisdom of granting such ill-defined, sweeping protections against liability.

In addition, while the order speaks to claims that result from service interruptions, I think the proposed tariff language lends itself to a much broader interpretation of the acts for which liability will attach only if the transmission owner/provider is found liable for gross negligence or intentional misconduct. For example, in response to the Commission's deficiency letter seeking further information about their proposed tariff language, including what types of personal injury damages and property damages the applicants intended to be covered, the applicants restated their proposed tariff language and simply noted that a court would make these types of factual determinations. The applicants provided one specific example of an instance in which the proposed liability provisions would not apply because it did not involve "service provided under this Tariff": a utility employee driving a utility vehicle on utility business that causes a traffic accident.

This example could be reasonably interpreted to fall within the scope of activities covered by the limited liability provisions. In other words, a utility employee driving *on utility business* could fall within the category of "any act . . . in any way associated with service provided" under the OATT. If so, then the liability provisions would protect against "any damages whatsoever" unless gross negligence or intentional misconduct is present. Again, I think these provisions could be interpreted as precluding recovery for personal injury or death directly caused by acts of the covered utilities, except in cases of gross negligence or intentional misconduct.

Further, in response to a Commission deficiency letter, applicants submitted currently effective limitation of liability provisions in the state-regulated, retail tariffs of the Midwest ISO transmission owners and state-regulated utilities that formerly owned transmission facilities and are now owned by companies in Midwest ISO. The applicants state that "more than half" of these provisions provide for a gross negligence standard or for "no liability" without additional specification. This order relies on the applicants' statement to rule that Midwest ISO and its transmission owners should be afforded similar protection and that disparate treatment is a disincentive to participating in the Midwest ISO. My review of the provisions of the state-regulated tariffs leads me to conclude that most of them link liability limitations specifically to service interruptions, deficiencies or variations. The same cannot be said for the expansive protections against liability proposed here with respect to "any act or omission in any way associated with service provided under this Tariff." Further, I do not find the

applicants' statement that "more than half" of the state liability provisions provide for a gross negligence or no liability standard to be convincing evidence of disparate treatment that will inhibit participation in the Midwest ISO.

I do not dispute that limiting liability for economic damages related to service interruptions can be appropriate in certain cases. However, the applicants have not shown that their broadly-worded provisions strike a proper balance between reasonable customer rates and the ability of harmed parties to seek recovery. For the reasons discussed above, I respectfully dissent.

	_____ Suedeen G. Kelly